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Mailed: January 8, 2003
Paper No. 23
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re QVC, Inc.

Serial No. 75/547,477

Manny Pokotilow of Caesar, Rivise, Bernstein, Cohen &
Pokotilow, Ltd. for QVC, Inc.

James T. Griffin, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Hohein and Hairston, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

QVC, Inc. has filed an application to register Q
RECORDS as a trademark for "musical sound recordings."¹

Registration has been finally refused under
Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on

¹ Application Serial No. 75/547,477, filed September 3, 1998, based on applicant's allegation of a bona fide intention to use the mark in commerce. An amendment to allege use was subsequently filed which asserts first use and first use in commerce as of February 1, 1999. The word "RECORDS" has been disclaimed apart from the mark as shown.

the ground that applicant's mark, when applied to its goods, so resembles the mark Q, as shown below, which is registered for "pre-recorded media, featuring music and/or other entertainment; namely audiotapes, compact discs, laser discs, phonograph records, cinematographic films, and video cassettes,"² as to be likely to cause confusion, mistake or deception.



Applicant has appealed. Applicant requested an oral hearing, but subsequently withdrew the request. We affirm the refusal to register.

Preliminarily, we must discuss an evidentiary matter. With its appeal brief, applicant has submitted printouts of registrant's web page and printouts taken from the United States Patent and Trademark Office website of third-party

² Registration No. 1,880,427 issued February 28, 1995; affidavits under Section 8 and 15 accepted and acknowledged, respectively. Although the registration covers other goods, the Examining Attorney's refusal to register is based on these goods only.

registrations for marks which include the letter "Q." The Trademark Examining Attorney has objected to this material, stating that its submission is untimely. Applicant, in its reply brief, argues that the material is not untimely because it referenced registrant's web site in its response filed November 11, 1999 to an office action and because it referenced the third-party registrations in its request for reconsideration filed January 16, 2002.

Under Trademark Rule 2.142(d), evidence submitted for the first time with a brief on appeal is generally considered by the Board to be untimely and therefore is given no consideration. A review of the record in this case shows that applicant, in its November 17, 1999 response to the Examining Attorney's office action, identified registrant's URL address and provided information taken from registrant's web site relating to the nature of registrant's goods and the channels of trade. However, applicant did not submit the actual printouts of the web site. In addition, applicant, in its request for reconsideration, argued that there was no likelihood of confusion in this case in view "of the many other registrations with the letter 'Q' in connection with records and record production..." However, applicant did not

submit copies of any third-party registrations or identify any specific "Q" marks.

Under the circumstances, and inasmuch as the actual printouts of the web site and third-party registrations were not submitted until applicant filed its brief on appeal, the Examining Attorney could not have objected to this material earlier. Thus, this is not a case where we will consider the Examining Attorney to have treated the web site information and the third-party registrations as being of record. In view thereof, the Examining Attorney's objection to the printouts as untimely is well taken and we will give them no consideration. We hasten to add that, even if we had considered the printouts, the result in this case would be the same.

At the outset, we note that our determination under Section 2(d) of the Act is based on an analysis of all of the probative factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a consideration of the marks. It is essentially applicant's position that when the marks are considered in their entirety, they are very different because applicant's mark includes the word "RECORDS" whereas the cited mark does not, and because, unlike the cited mark, applicant's mark does not include a design element.

While applicant is correct that the respective marks must be compared in their entirety, it is nevertheless the case that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of mark" 224 USPQ at 751.

In this case, we agree with the Examining Attorney that when the respective marks are considered in their entirety, they are substantially similar in sound, appearance, connotation and overall commercial impression.

The dominant portion of applicant's mark is clearly the letter "Q" because the word "RECORDS" is descriptive of applicant's goods as evidenced by applicant's disclaimer thereof. Further, it is also the letter "Q" which is the dominant and source-identifying element of the cited mark as the square design is mere background matter. Also, we note that because applicant seeks registration of its mark in typed drawing form, its mark can be depicted in any reasonable manner. This would include the use of a shaded or dark background and lettering that is identical to that used by registrant. Thus, registrant's "design element" does not create a significant difference between the marks.

In addition, it is a well established principle that likelihood of confusion may not be determined upon a side-by-side comparison of the marks. Such a comparison is not the ordinary way a prospective purchaser would be exposed to the marks. Rather, it is the similarity of the general overall commercial impression engendered by the marks that must be considered. This test requires us to consider that the average purchaser normally retains a general rather than a specific impression of trademarks. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Envirotech Corp. v. Solaron*

Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

We turn next to a consideration of the respective goods. Applicant contends that there is no likelihood of confusion because its recordings are of popular music sold to ordinary consumers, whereas registrant's recordings relate to 3D sound and audio technology and are marketed to audio and video professionals. Further, applicant argues that purchasers of sound recordings are sophisticated; and that the decision to purchase a particular sound recording is driven by the artist, composition, or type of music and not by the record label. Finally, applicant argues that it is entitled to register its mark because it already owns Registration No. 1,716,625 for the mark Q RECORDS AND VIDEO for "retail store services in the field of home entertainment software; namely, phonograph records, audiocassette tapes, compact discs, video laser discs, and accessories for the aforementioned goods; namely storage containers, cables and cleaners."

The Examining Attorney contends that the respective goods are legally identical because applicant's musical sound recordings are encompassed within registrant's pre-recorded media featuring music. In addition, the Examining Attorney maintains that consumers do consider the label of

a recording in the purchasing decision because the label may indicate the quality of the recording.

It is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or asserted to actually be. See *Octocom Systems, Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). Thus, where, as here, there are no limitations in either applicant's identification of goods or registrant's identification of goods as to the nature or type thereof, it must be presumed that applicant's goods include musical sound recordings of all types and that registrant's goods include pre-recorded media featuring music of all types. We therefore agree with the Examining Attorney that registrant's goods, as identified, are sufficiently broad to encompass applicant's goods and that the goods must be considered legally identical. Further, we must presume that applicant's and registrant's goods move in all channels of trade which would be normal for these types of goods, e.g., record stores, electronic stores, and mass merchandisers, and that

they would be purchased by all potential buyers, e.g., ordinary consumers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In reaching our decision, we have not overlooked applicant's contention that there is no likelihood of confusion in this case because purchasers of musical sound recordings do not look to the record label when making their purchases. In support of its contention, applicant relies on two cases. The first case is *In re Polar Music International AB*, 714 F.2d 1567, 221 USPQ 315, 318 (Fed. Cir. 1983) ("People purchase sound recordings because of the sound they contain . . . it is commonplace for the public to request records and tapes by the recording artist.") The second case is *Sunenblick v. Harrel*, 895 F.Supp 616, 38 USPQ2d 1716 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 684 (2d Cir.), *cert. denied*, 519 U.S. 964, 117 S.Ct. 386 (1996) (" ... buyers of musical sound recordings are relatively sophisticated consumers whose purchasing decisions are driven by a recognition of and search for a particular artist or composition, and whose awareness of the record label - if such awareness exists at the time of purchase - is at best a peripheral concern compared to the contents of the recording.")

Each of these cases is readily distinguishable. The case of *In re Polar Music International AB* involved the issue of mere descriptiveness, not likelihood of confusion. Thus, that case does not support applicant's position that there is no likelihood of confusion in this case because record labels have little or no bearing on the purchasing decision. Further, although the case of *Sunenblick v. Harrel* involved the issue of likelihood of confusion, it is distinguishable because it was an infringement suit and the court considered other factors, e.g., the trade dress and the manner of use of the marks and the fact that the goods were not proximate in the marketplace, in reaching its decision. In addition, the court found that the marks were distinguishable.

More importantly, the court stated that it was not willing to go so far as to accept the defendant's contention in that case that record labels are irrelevant to the purchasing decision. As the court acknowledged, at 38 USPQ2d 1731, "[t]he unavoidable conclusion [of such a contention] would be that such marks can never receive protection under the trademark law."

With respect to applicant's contention that the purchasers of musical sound recordings are sophisticated, as we have already noted, we must presume that both

applicant's and registrant's musical sound recordings are purchased by ordinary consumers who are generally not considered particularly sophisticated.

Finally, the fact that applicant already owns a registration for the mark Q RECORDS AND VIDEO for retail services featuring, among other things, phonograph records, audiocassette tapes and compact discs does not lead us to reach a different result in this case. It is well settled that each case must be decided on its own merits. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001 ["Even if some prior registrations had some characteristics similar to [applicant's application], the PTO's allowance of such prior registrations does not bind the Board or this court."]).

In sum, we find that purchasers familiar with registrant's Q and design mark for pre-recorded media featuring music may, upon seeing applicant's mark Q RECORDS on musical sound recordings, assume that applicant's goods originate from the same source as registrant's goods, or are somehow sponsored by or approved by registrant. For example, this would especially be the case if a consumer familiar with a Q and design compilation of current hits were to encounter another compilation of current hits under the mark Q RECORDS.

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Decision: The refusal to register under Section 2(d)
is affirmed.